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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 859

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT, THE WESTERN UNION TELEGRAPH COMPANY, IN OPPOSITION

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BRIEF FOR RESPONDENT, THE WESTERN UNION TELEGRAPH COMPANY, IN OPPOSITION

OPINIONS BELOW

The Tentative Decision of the Federal Communications Commission (J.A. 681-721)[1] is reported at 38 F.C.C. 370 (1964). The Commission's memorandum opinions and orders on final decision (J.A. 1116-31),

[1] Citations to the record herein will follow the pattern adopted by Petitioners. See Pet. p. 2, fn. 1.

and on reconsideration (J.A. 1173-87), are reported at 37 F.C.C. 1111 (1964) and 38 F.C.C. 761 (1965), respectively. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-25a) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 15, 1966 (Pet. App. 26a). The petition for a writ of certiorari was filed on December 13, 1966. The jurisdiction of this Court is invoked, *inter alia*, under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the orders of the Federal Communications Commission setting aside as unlawfully discriminatory the rates charged by American Telephone and Telegraph Company and associated Bell System companies for so-called TELPAK A and B service rests upon a proper construction of Section 202(a) of the Federal Communications Act.

2. Whether petitioners were denied constitutional due process when, in accordance with long established practice approved both by Congress and the courts, the staff of the Commission's Common Carrier Bureau participated in the decisional process as well as in the hearings.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.* are set forth in Appendix C to the Petition.

STATEMENT

For some years, the American Telephone and Telegraph Company and its associated Bell System companies (Bell) had on file with the Federal Communications Commission (Commission) tariffs for a service known as "private line" service. Under these tariffs, a customer could lease facilities enabling him to communicate between specified points whenever, and as much, as he pleased without going through the usual call-and-hook-up process (Pet. App. 6a). Private line service includes all sorts of bulk communications services, such as telephone, telegraph, telephoto, data transmission, signalling, etc. (Pet. App. 6a-7a).

Allegedly, to meet anticipated competition from private microwave systems, the eligibility for which was broadened in *Allocation of Microwave Frequencies Above 890 Mc,* 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960), Bell, on January 16, 1961, filed its so-called TELPAK tariff. This tariff contained four subdivisions, TELPAK A, B, C, and D, corresponding to the number of private line channels available to a customer (J.A. 1187-1190); TELPAK A was the equivalent of 12 voice channels, TELPAK B, 24, TELPAK C, 60, and TELPAK D, 240 (J.A. 1188).[2] As pointed out by the court below (Pet. App. 8a), the disparity between TELPAK and private line rates is "startling." Thus, the monthly charge for TELPAK A is $1,860 compared with the charge for 12 channels under the private line tariffs of $3,780. For TELPAK B, the

[2] The TELPAK rate structure included two basic charges, one for base capacity on a per airline mile per month basis, and the other for channel terminals which varied with the type of terminal equipment utilized (*e.g.*, telephone, teletypewriter, data terminal equipment) (J.A. 1188).

charge is $2,720 compared with the charge for 24 private line channels of $7,560 (Pet. App. 8a) The tariff described the services offered as:

> "* * * communications paths of various widths (TELPAK Channels) which are capable of transmitting various forms of electrical communication required by a modern business, such as telephone, teletypewriter, control, signalling, facsimile and data. The Telephone Company will provide channelizing equipment to subdivide TELPAK channels into channels of lesser width (derived channels) or will terminate the entire TELPAK channel for use as a broadband transmission medium" (J.A. 1188).

In March, 1961, The Western Union Telegraph Company (Western Union), Bell's only common carrier competitor in the private line field, protested that Bell was applying the TELPAK tariff to service furnished over diverse private line channels rather than limiting its application to service provided over discrete broadband channels as specified in the tariff (J.A. 1198-1212).[3] The Commission, on April 12, 1961 and again on June 30, 1961, ordered Bell to comply with the terms of its tariff and to apply TELPAK rates only when customers were furnished with a single broadband channel from which channels of a lesser bandwidth were derived (J.A. 1225-31, 1247-54). Thereafter, on August 3, 1961, Bell amended the TELPAK tariff to permit the furnishing of TELPAK service over diverse facilities (J.A. 1255-56).

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[3] Diverse channels are those furnished over such physical facilities or routes as the telephone company chooses or has available at the time, and includes the use of channels not derived from a single broadband channel. Discrete channels are those provided in a single broadband on the same physical facilities.

Following further objections by Western Union (J.A. 1256-76) as well as by Motorola, Inc., a private microwave equipment manufacturer (J.A. 1276-93), the Commission, on September 8, 1961, issued an order instituting an investigation into the lawfulness of the TELPAK tariff as thus amended (J.A. 6-10).[4] The order provided, *inter alia,* that:

> "* * * the examiner to be designated to preside at the hearing shall certify the record to the Commission for decision without preparing either an Initial or Recommended Decision;" (J.A. 10).

Invoking the Administrative Procedure Act, Bell and Intervenor, Aeronautical Radio, Inc., requested that the order be modified to require the Examiner to issue an initial decision; further, they moved that the Commission's Common Carrier Bureau not be permitted to participate in the decisional stages of the proceeding (J.A. 11-18). The Commission, however, denied those requests (J.A. 51-56), pointing out that the separation of functions provision of the Administrative Procedure Act was specifically inapplicable to proceedings, such as the instant proceeding, involving the validity of rates charged by a carrier, and further that the movants would have an opportunity to file proposed findings as well as exceptions to the Initial Decision and to request oral argument before the Commission (J.A. 53).

Extensive hearings were held over the period from October 31, 1961, to September 17, 1962. Thereafter,

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[4] The Commission simultaneously suspended the effectiveness of the amendment for the 3 months permitted by Section 204 of the Communications Act (47 U.S.C. 204). However, with the expiration of the suspension period on December 8, 1961, the tariff amendment went into effect and TELPAK has been available over diverse facilities since that time.

on March 20, 1964, the Commission issued its Tentative Decision (J.A. 681-721), in which it found, on the basis of a detailed analysis of the evidence, that (J.A. 718-9):

> "(a) Services furnished under the TELPAK tariff and those furnished under the various other private line tariffs are like communications services.
>
> "(b) There are no material cost differences attributable to furnishing a number of channels to one customer under TELPAK as opposed to furnishing the same number of channels to several customers under the other private line tariffs.
>
> "(c) There is no justification for TELPAK A and TELPAK B in terms of competitive necessity, inasmuch as the rates for the equivalent number of channels offered under ordinary private line tariffs are reasonably competitive with the costs of private microwave systems. * * *".

Accordingly, the Commission proposed to direct Bell to file "appropriate rate schedules * * * designed to eliminate the unlawful discriminations herein found" (J.A. 719).[5]

Exceptions were subsequently filed against the Tentative Decision. Oral argument was held before the Commission *en banc,* and, on December 24, 1964, the Commission issued a Memorandum Opinion and Order substantially adopting the Tentative Decision (J.A. 1116-31). Petitions for reconsideration of this order

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[5] With regard to TELPAKs C and D, the Commission found that there was apparent justification in terms of meeting competition from private microwave systems with comparable channel capacities. However, the Commission was unable to determine on the existing record whether the rates therefor were compensatory in relation to the costs of furnishing the services (J.A. 718).

were denied by the Commission's Memorandum Opinion and Order released May 4, 1965 (J.A. 1173-87).

Eight petitions for review of the Commission orders relative to TELPAKs A and B[6] were filed in the court below by 17 TELPAK users, led by 26 Bell Companies and including the United States acting through the Administrator of General Services.[7] The court below affirmed the Commission's finding of unlawful discrimination in a detailed opinion, in which it concluded (Pet. App. 25a):

> "* * * It is the well-established proposition that the findings of an administrative agency within the boundaries of its statutory power, if supported by substantial evidence on the record as a whole, are not to be disturbed by a court. But at the same time we cannot neglect that other well-established rule that the conclusions of the agencies are subject to judicial review, and for that purpose the reviewing authorities must know the bases upon which the conclusions rest. So we have explored the premises for the Commission's findings and conclusions in the case at bar. We find no reason to disturb them.
>
> "We commend the full text of the three opinions under review in this proceeding to the attention of any other reviewing authority and of any student researching in this area."

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[6] No issue was raised as to TELPAKs C and D.

[7] Western Union was permitted to intervene in the court below in support of the Commission's orders.

ARGUMENT

Petitioners, who are far fewer in number than in the court below,[8] do not here dispute that TELPAK and private line services are "like" services and that there is no material cost differences or competitive necessity to justify lower rates for TELPAKs A and B than for private line service. Instead, Petitioners urge the presence of substantial legal questions. However, it has long been recognized that questions of unlawful discrimination present primarily questions of fact. See, *e.g., Texas & Pacific Ry. Co.* v. *I.C.C.*, 162 U.S. 197, 238 (1896); *Board of Trade of Kansas City, Mo.* v. *United States*, 314 U.S. 534, 546 (1942) and cases there cited. Moreover, not only has the court below obviously subjected the Commission's findings and conclusions to unusually careful and thorough scrutiny, but its affirmance thereof plainly was based upon a strong conviction that none of Petitioners' claims had any merit either factually or legally.[9]

As shown below, this conviction is eminently correct and there is no basis for holding that the Commission's "finding is unsupported or without rational basis or rests on an erroneous construction of the statute." *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, 6-7 (1943) and cases there cited; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 348-9 (1940). The decision below accords with established precedents and presents no novel question or conflict of decision. In

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[8] Significantly, neither Bell nor the Administrator of General Services has petitioned for certiorari.

[9] Such conviction is, we submit, manifest from the refusal of the court below to continue in effect, pending certiorari, the stay which it had granted in the early stages of the proceeding before it.

addition, this Court only recently denied certiorari with regard to the same procedural question which Petitioners seek to raise. See *Wilson & Co., Inc., et al.*, v. *United States,* 335 F. 2d 788, 796 (7th Cir. 1964), certiorari denied on this point No. 765, Oct. T. 1964, 380 U.S. 951 (1965). Accordingly, we submit, there is no warrant for further review by this Court.

I

The Affirmance by the Court Below of the Commission's Orders Is Based on a Proper Construction of the Communications Act

(a) In seeking to cast doubt upon the affirmance by the court below of the Commission's ruling that TELPAKs A and B are unlawfully discriminatory in violation of Section 202(a) of the Communications Act, Petitioners argue (Pet. pp. 10-11) that that court has construed Section 202(a) too narrowly.[10] Thus, they imply (Pet. p. 11) that the Court of Appeals failed to appreciate that Section 202(a) prohibited "only that discrimination which is unreasonable, undue or unjust." But the court plainly made no such error. As is apparent from the excerpt which Petitioners themselves quote in this connection from the court's

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[10] Petitioners' claim, that this case presents the first judicial review of Section 202(a) and its applicability to competitive rate making, is at odds with Petitioners' own recognition that Section 202(a) * * * was purposefully drawn by Congress to conform to the comparable provision of Section 2 of the Interstate Commerce Act. * * * " (Pet. p. 13). The latter Section has acquired an extensive gloss on which Petitioners themselves seek to draw to buttress their position. Likewise, Petitioners' reference (Pet. p. 10) to the Bell brief for support of its claim of importance is out of keeping with the fact that Bell is not here seeking certiorari whereas it led the attack upon the Commission's orders in the court below.

opinion (Pet. pp. 10-11), the court below was fully aware that Section 202(a) makes it unlawful:

> "* * * for 'any' carrier to make 'any' *unjust* discrimination by 'any' means or to make 'any' *undue* preference to 'any' particular person or to subject 'any' person to 'any' *undue* prejudice." Emphasis supplied).

Further, Petitioners urge (Pet. p .11) that the ruling below overlooks the classification provisions of Section 201(b), in particular, the "commercial" classification, which, according to Petitioners (Pet. p. 11), is a "classification by volume use," applicable to "TELPAK [as] in effect a 'large commercial' classification." But apart from the fact that no such argument was made or question raised in the court below,[11] Petitioners' arguments as to the scope of the "commercial" classification is based solely upon their own *ipse dixit.* Moreover, it should be noted that the TELPAK A and B rates have been held to be unjustly discriminatory *vis-a-vis* private line rates and the latter type of service similarly would also come within the "commercial" classification. Consequently, since Petitioners do not question the Commission's findings (J.A. 718), affirmed by the Court below (Pet. App. 15a-16a), that TELPAK and private line services are "like" services with only the rates charged being different, the classification provisions of Section 201(a) do not help Petitioners' position.

Had a separate "classification" been contrived for TELPAKs A and B, such "classification" would, we

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[11] Contrary to Petitioners' claim (Pet. pp. 12-13), the issue designated by the Commission with regard to Section 201(b) related solely to the reasonableness of the TELPAK rates, and did not involve the classification provisions of that Section. (See J.A. 9; see also J.A. 685).

submit, in the light of the record herein, clearly have been unreasonable, and would have run afoul of the "just and reasonable" requirement of Section 201(b) and the proscription against unlawful discriminations contained in Section 202(a). Indeed, despite the fact that Section 201(b) permits a separate classification for "Government", the Commission has held that since there is no cost justification for lower rates to the Government, it must pay the same rates as other users. *In the Matter of Charges for United States Government Domestic Telegraph Communications,* 12 F.C.C. 374, 383-6 (1947).

(b) Petitioners also suggest (Pet. p. 12) that the Commission's finding of unlawful discrimination ignores the acceptance generally of volume discounts and is unjustified by the Communications Act. However, whereas in other industries volume sales typically result in cost savings to the seller, the Commission found (J.A. 718)—and the Petitioners do not question—that Bell's cost in providing, for example, 12 TELPAK voice channels is at least[12] twelve times the cost of providing one voice channel to 12 separate private line customers. This is self-evident inasmuch as private line and TELPAK are identical services. And when TELPAK was initially offered, the larger private line customers were merely billed under the reduced TELPAK rates, without any change whatsoever in the facilities furnished to them (Pet. App. 12a).

Moreover, Petitioners' implication that volume discounts are permissible in commerce generally without

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[12] It may well be that TELPAK involves greater administrative costs, in some situations, than does private line service so that *pro rata* costs per voice channel might well be greater with TELPAK than with private line service (See J.A. 695-8).

any cost or competitive justification is belied not only by the express provisions of the Robinson-Patman Act, 15 U.S.C. 13(c), but by this Court's decisions, including *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947) relied on by Petitioners (Pet. p. 12). Indeed, while the Court in that case held that volume discounts do not *per se* violate the Robinson-Patman Act, it carefully pointed out (at p. 746) that volume discounts were illegal under certain conditions.

Likewise, it is significant, contrary to Petitioners' assertion (Pet. p. 12), that the ruling here does not condemn all volume discounts as discriminatory. The Commission expressly admonished that its decision should not "be construed as foreclosing carriers from establishing schedules of charges which will promote the use of volume communication" (J.A. 718-9, 1122). It disapproved the TELPAK A and B discounts because it found that these discounted rates were not justified by either cost differentials or competitive necessity (J.A. 718-9).

Further, the Commission's reading of Section 202 (a) accords not only with its own prior construction of that Section,[13] but also with this Court's construction of Section 2 of the Interstate Commerce Act from which Section 202(a) is derived. See, e.g. *Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194 (1944); *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 352 (1940). In *Eastern-Central* this Court noted the I.C.C.'s former policy—when it had regulated only railroad rates—under which it initially had rejected all wholesale, i.e. volume dis-

[13] See e.g. *A.T.&T. and Western Union Private Line Cases*, 34 F.C.C. 217, 317 (1963), aff'd *sub nom., Wilson & Co.* v. *United States*, 335 F. 2d 788 (7th Cir. 1964) and cases there cited.

count, rates and ultimately had permitted differences in rates only when justified by differences in costs, all with judicial approval (321 U.S. at 205). Subsequently, when the I.C.C. was given rate responsibility over competing modes of transportation, this Court held that the Commission could take competitive considerations, as well as costs, into account in fixing rates, but that neither factor is necessarily controlling; "* * * the choice would be for the Commission to make upon a proper weighing of the facts and opposing policies possibly applicable" (*Id.* at 210). Such weighing, as the court below pointed out (Pet. App. 18a-19a), is what the Commission did here.

(c) This Court's opinion in *Eastern-Central* is one answer to Petitioners' further and unsupported assertion (Pet. pp. 13-14) that the holding below conflicts with decisions of this Court. Another answer is Petitioners' own failure to pinpoint the decisions of this Court involved in the alleged conflict.[14] In urging a conflict, Petitioners refer to two decisions of this Court. But no conflict exists with regard to either. In *I.C.C.* v. *Baltimore & Ohio R. Co.*, 145 U.S. 263 (1892) (Pet. p. 14), this Court found the lower group transportation rate there involved to be justified by cost savings (145 U.S. at 281-2):

> "* * * To bring the present case within the words of this Section [Section 2], we must assume that the transportation of ten persons on a single ticket is substantially identical wth the transportation of one, and, *in view of the universally accepted fact that a man may buy, contract, or manufacture*

[14] Indeed, Petitioners' discussion in this connection is concerned primarily with agency decisions, which in fact are wholly consistent with the result here.

on a large scale cheaper proportionately than upon a small scale, this is impossible." (Emphasis supplied)[15]

And in *I.C.C.* v. *Delaware L. & W. R. R.*, 220 U.S. 235 (1911) (Pet. p. 14), this Court set aside an attempt by the railroads to deny freight forwarders the benefits of carload rates solely because they did not own the property which they offered for shipment.

(d) As to Petitioners' further contention that TELPAK A and B rates are discriminatory only in theory and do not result in any actual injury (Pet. pp. 15-17), it should be noted that the unlawful discrimination inherent in TELPAKs A and B results in economic injury in at least three ways. First, it places at an economic disadvantage, vis a vis their larger competitors, those companies whose bulk communications needs are not large enough, either alone or in conjunction with other users, to obtain the benefit of at least a TELPAK A.[16] The magnitude of this injury is highlighted by the fact that the rates for TELPAK A are at least 51% lower than the rates for comparable private line service (J.A. 694; Pet. App. 8a). Second, it is demonstrable (J.A. 710) that the revenues received from serving new bulk communications customers as a result of TELPAKs A and B do not offset the loss in revenues resulting from the switch by old customers to TELPAKs A and B. This net revenue loss re-

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[15] See, also III-B SHARFMAN, INTERSTATE COMMERCE COMMISSION, p. 375.

[16] For example, United Press International, an intervenor before the Commission, specifically complained of "the advantage accruing to its competitor, Associated Press, whose pattern of private line service enabled it to take advantage of TELPAK rates while that of UPI did not" (J.A. 719).

dounds to the detriment of the small non-TELPAK customers. And third, as found by the Commission (J.A. 717-8) the discriminatory low TELPAK rates diverted business to Bell and resulted in substantial revenue losses to Western Union.

Similarly out of place here is Petitioners' related argument (Pet. pp. 15-16), that the striking down of TELPAKs A and B results in "real discrimination" because "common carrier customers with inadequate requirements for TELPAK C and D rates now would be deprived of any real opportunity to benefit from TELPAK A and B rates unlike the larger users." In so urging, Petitioners basically are complaining (inadvertently no doubt) with regard to the Commission's failure, at this time, also to condemn TELPAKs C and D as unlawfully discriminatory.[17] Moreover, this argument ignores the fact that for the past 6 years the users of TELPAKs A and B have been the beneficiaries of low rates to the detriment, to paraphrase Petitioners, of those "common carrier customers with inadequate requirements for TELPAK" A and B.

Nor is the effect of the Commission's order here improperly to bestow a benefit upon Bell and Western Union, as Petitioners also contend (Pet. p. 16). As regulated common carriers, both Bell and Western Union are limited to earning a reasonable return. Indeed, Bell is now involved in an overall interstate rate investigation (Docket No. 16258) recently instituted by the Commission. Consequently, to the extent that the Commission's orders here result in Bell's raising

[17] As pointed out above, no issue was raised in the petitions for review herein as to the Commission's finding that TELPAKs C and D may be justified by competitive necessity (J.A. 718).

its TELPAK A and B rates,[18] they operate to remove the subsidy heretofore accorded the users of TELPAKs A and B and open the way for rate reductions for other regulated services provided by Bell. Thus, the beneficiaries ultimately of the removal of the unlawfully discriminatory TELPAK A and B rates are other Bell customers, not Bell itself.

(e) Finally, improperly characterizing TELPAK rates as "developmental" (e.g., Pet. pp. 17, 18) and claiming that TELPAK has stimulated a "broad surge in use of communications services and facilities" (Pet. p. 17), Petitioners contend that the Commission's holding herein would have a "stultifying effect" and lay "a deadening hand upon technological innovation" (Pet. p. 19), and hence fails to give effect to a "higher, overriding consideration * * * which must ultimately govern—the public interest standard * * *" (Pet. p. 17).

But, as pointed out earlier, TELPAK and private line service are "like" services with TELPAK being only a pricing device wholly indistinguishable from the available services under private line tariffs. Consequently, the alleged stimulus, if any, afforded by TELPAK consists solely of its unlawfully discriminatory volume discount for which the tab is picked up by the small user, who is limited to non-discounted private line service. Moreover, as pointed out by the court below (Pet. App. 24a), "The Commission has not for-

[18] The results of a cost study presented by Bell in September, 1965, in the *Domestic Telegraph Service Investigation*, F.C.C. Docket No. 14650 showed an indicated rate of return of only .3 of 1% for TELPAK. Similarly, a Bell vice-president recently testified in the aforementioned rate investigation that the TELPAK rates are not reasonable and "need to be revised * * * up." (F.C.C. Docket No. 16258, Tr. 4254).

bidden TELPAK. At the most, it has told the Company to make its rates for the new service non-discriminatory with its existing services. * * * We do not find the horrendous effects pictured by Petitioners."

In any case, this Court has left no doubt that the elimination of unlawful discrimination is itself one of the prime public interest objectives of regulation. For example, as early as 1906, this Court declared:

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. * * *" *New York, N.H. & H.R. Co.* v. *I.C.C.*, 200 U.S. 361, 391 (1906).[19]

II

The Commission's Procedures Do Not Operate to Deny Constitutional Due Process

(a) This Court has only recently denied certiorari with respect to the same procedural question as Petitioners seek to raise here. *Wilson & Co.* v. *United States,* 335 F. 2d 788 (7th Cir. 1964), certiorari denied on this point, No. 765 Oct. T. 1964, 380 U.S. 951 (1965). In *Wilson,* which likewise involved an F.C.C. rate proceeding, the Commission, as here, directed the Examiner not to prepare a decision, and instead itself issued

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[19] To the same effect, see, e.g., *Kansas City Southern Railway* v. *Albers Commission Co.*, 223 U.S. 573, 597 (1912); *The Shreveport Case,* 234 U.S. 342, 356 (1914); *Louisville & Nashville R. Co.* v. *United States,* 282 U.S. 740, 749, 750 (1931); *Merchants Warehouse Co.* v. *United States,* 283 U.S. 501, 512, 513 (1931); *State of New York* v. *United States,* 331 U.S. 284, 296 (1947).

a Tentative Decision, received exceptions, heard oral argument, and then issued a final decision, all with the participation of its Common Carrier Bureau.[20] In rejecting the Petitioners' complaints, the Seventh Circuit there held (335 F. 2d 788, 796):

> "* * * that it was proper for members of the Commission's Common Carrier Bureau who were counsel of record in the hearing before the Commission to participate in the decisional process that led to the orders under review; and that this conduct did not violate section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a), sections 409(c) and 205(a) of the Communications Act of 1934, 47 U.S.C. §§ 409(c), 205(a), the Commission's own rules, as well as constitutional due process."[21]

Significantly, not only did this Court refuse to review this holding of the Seventh Circuit, but the Court simultaneously granted certiorari with respect to other rulings of the Seventh Circuit in the same proceeding. See, *United States* v. *Wilson & Co.*, No. 909, Oct. T. 1964, certiorari granted, 380 U.S. 950 (1965).

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[20] Although *Wilson*, as here involved rates of Bell, Bell took the position in *Wilson* that "* * * the procedure followed by the Commission in this case does not run counter to existing statutes and that any change must be fashioned by Congress, or by the administrative agencies through rules of procedure." Bell Brief in *Wilson & Co.* v. *United States, supra*, pp. 25-26.

[21] As noted by the Commission in *American Telephone & Telegraph Co.*, 2 F.C.C. 2d 142 (1965), 2 F.C.C. 2d 877 (1966), another rate making proceeding where the same question has been raised (at 144):

> "The separation of functions procedures which we follow here are not novel. They are long established, having been consistently employed by the Commission since the inception of its ratemaking functions. They have been used in several recent important Commission ratemaking proceedings."

(b) Contrary to Petitioners' allegation (Pet. pp. 22-23) that "the Commission's procedures conflict * * * with the clear holding of *Morgan* v. *United States,* 304 U.S. 1 (1938)," the Commission's procedures here are fully in accord with the *Morgan* group of cases. In the *Morgan* case cited by Petitioners, this Court reversed a rate order of the Secretary of Agriculture because the interested parties were not given "a reasonable opportunity to know the claims of the opposing party [the Secretary] and to meet them" (304 U.S. at 18). As noted by the Court, the Secretary had never clarified his position during the hearing (304 U.S. at 19), and the first notice the parties received of his "concrete claims" was after the Secretary had finally "accept[ed] and ma[de] as his own the findings which ha[d] been prepared by the active prosecutors for the Government, after, an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (*Id.* at p. 22).

Thus, the thrust of *Morgan* is not that preparation of a decision by counsel who had participated in the hearings was *per se* improper. To the contrary, following the remand, the Secretary reissued his original final decision as an initial or tentative decision, and gave the parties an opportunity to file exceptions and to present oral argument thereon before issuing his final decision, a procedure which parallels closely that followed by the Commission here and under which the parties were given a full opportunity to know and meet the Commission's claim before issuance of a final decision. Since this procedure was approved by this Court in *United States* v. *Morgan,* 307 U.S. 183, 187 (1939) and again in *United States* v. *Morgan,* 313 U.S.

409, 415-6 (1941), the procedure here followed by the Commission plainly is without constitutional infirmities.

In this regard, there should be noted the inaccuracy of Petitioners' claim (Pet. p. 24), that the Common Carrier Bureau counsel are "advocates in the case." As pointed out by the Commission in dealing with this point in *American Telephone & Telegraph Co., supra,* at 146:

> "* * * The Commission * * * expects its Common Carrier Bureau to provide such expert assistance, as it may require, both in the many ratemaking problems handled informally and in those matters which the Commission determines to require resolution in a formal investigation. In the latter event the function of the Common Carrier Bureau is *not* to be an advocate of a preconceived position or to take a conventional adversary position. Rather it is to insure the development of a full and complete record which presents the facts and other ratemaking considerations relevant to a fair and meaningful legislative determination by the Commission of the complex issues involved.[22] (Emphasis in original)

(c) Petitioners' claims (Pet. pp. 25-26) with regard to the Commission's order dispensing with the hearing

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[22] Also it should be noted that the Commission's *Rules Governing Ex Parte Communications,* 1 F.C.C. 2d 49 (1965), not only bars *ex parte* communications between interested persons and decision-making Commission personnel during the pending of all proceedings which have been designated for hearing, but includes the Commission's Common Carrier Bureau as decision making Commission personnel. As stated by the Commission in *American Telephone & Telegraph Co., supra,* at 879-880, these rules merely recognized and codified the pre-existing practice.

examiner's decision ignores the fact that Section 8(a) of the Administrative Procedure Act expressly contemplates the tentative decision procedure here followed by the Commission. Section 8(a) provides that the hearing examiner's decision may be omitted in situations, *inter alia*, where "in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision * * *." Indeed, in commenting thereon, the Attorney General has noted that this provision:

> "* * * permits, in proceedings to make rules and to determine applications for initial licenses, the continuation of the widespread agency practice of serving upon the parties, as a substitute for either an examiner's report or a tentative agency decision, a report prepared by the staff of specialists and technicians normally engaged in that portion of the agency's operation to which the proceeding in question relates * * *"[23]

(d) Similarly without any substance is Petitioner's further argument (Pet. pp. 26-27) that the justification of the Commission procedure here involved as legislative action is "out-dated." The dichotomy between adjudication and legislative, i.e. ruling making, action—which Petitioners would thus discard as obsolete—was expressely applied by the Ninth Circuit in its recent decision in *California Public Utilities Commission* v. *United States,* 356 F. 2d 236, 241, (1966) certiorari denied, 335 U.S. 816 (October 10, 1966) as well

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[23] S. Doc. No. 248, 79th Cong., 2d Sess., p. 229, see, also the Attorney General's Manual on the Administrative Procedure Act (1947) pp. 82-83.

as by this Court in *Hannah* v. *Larche*, 363 U.S. 420, (1960) cited by Petitioners (Pet. p. 26).[24]

In any case, it should be noted (1) that the Administrative Procedure Act is based on the basic dichotomy between adjudication and rulemaking with the latter explicitly including the making of future rates, such as is here involved and (2) that, as Petitioners point out (Pet. p. 27, fn. 20), the separation of functions provisions of Section 5(c) of that Act applies only to adjudication—not to rule making— and even within the area of adjudication, "proceedings involving the validity or application of rates * * * of public utilities or carrers," are expressly exempted from the separation requirements. In a word, the Administrative Procedure Act imposes no requirement with regard to separation of functions in ratemaking proceedings, whether such proceedings be regarded as rulemaking or adjudication.

(e) Whatever its abstract validity, Petitioners' further argument (Pet. p. 29) that "the proscriptions of the Administrative Procedure Act are not to be equated with due process" has no place here. As shown earlier herein, each step of the Commission's procedure here is expressly provided for by the Ad-

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[24] Immediately following the statement from *Hannah* quoted by Petitioners (Pet. p. 26), this Court went on to rule (360 U.S. at 442):

> "On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used * * *.
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> • • •
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> "It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings and that since the Commission does not adjudicate it need not be bound by adjudicatory procedures."

ministrative Procedure Act. Petitioners significantly do not question the constitutionality of the various provisions of the Administrative Procedure Act sanctioning such procedure.

Moreover, contrary to Petitioners' implication (Pet. p. 28), the courts have recognized that generally compliance with the Administrative Procedure Act simultaneously satisfies due process. Apart from *Gonzales* v. *United States,* 348 U.S. 407 (1955) which did not involve the Administrative Procedure Act, the other cases cited by Petitioners (Pet. p. 28) involved for the most part, situations where the agency order in issue was set aside for failure to comply with the controlling provisions of the Administrative Procedure Act.

Sangamon Valley Television Corp. v. *United States,* 269 F. 2d 221 (D. C. Cir. 1959), on which Petitioners place special emphasis in this connection (Pet. pp. 28-29), is wholly inapposite. In that case which "involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege * * *" (269 F. 2d at 224), the Court of Appeals set aside the Commission's license grants on the ground that extensive *ex parte* solicitations were made to members of the Commission by a party with heavy financial interest in the outcome of the proceeding (*Id.* at 223-224). Not only did that case not involve staff separation of functions, but here the staff of the Commission's Common Carrier Bureau plainly have not gone beyond their responsibilities in consulting with the Commission nor do they have any stake, financial or otherwise, in the outcome of this proceeding.

(f) Finally, despite Petitioners' contentions (Pet. pp. 30-32), there is nothing in the recent proceedings

before Congress or the Administrative Conference of the United States to support Petitioners' claim of denial of constitutional due process. To the contrary, as pointed out by the Commission in *American Telephone & Telegraph Co., supra,* at 145:

> "* * * In 1952, the Congress considered the separation of functions question and decision-making procedures in the specific context of Commission practice. * * * [At that] time, Congress considered and expressly rejected the concept that separation of function procedures must be utilized by the Commission in rate making proceedings. [fn. omitted]
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> "* * * In 1961, the Congress * * * considered the separation of functions question when it again amended the separation of function provisions contained in section 409 of the Communications Act [fn. omitted]. On this further reappraisal Congress did not extend the separation of function provisions to ratemaking." [25]

Moreover, while the Administrative Conference has made recommendations which, if followed by the Commission, might curtail the participation of its Common Carrier Bureau in the decisional process.[26] there is

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[25] Section 409(c)(2) of the Communications Act, 47 U.S.C. 409(c)(2), as thus amended, subjects licensing proceedings under that Act to the separation of functions provision of Section 5(c) of the Administrative Procedure Act by countermanding the exemption for licensing proceedings in Section 5(c).

[26] The Conference's Recommendation No. 19, stressed by Petitioners (Pet.. p. 31), is phrased in terms of "off-the-record communications between the *presiding examiner* and members of the agency's staff" (Emphasis supplied). In addition to the fact that the Recommendation does not apply to such communications between *agency members* and its staff, the Commission practice in rate cases, as mentioned earlier, is for the Commission itself to issue a Tentative Decision, rather than having the examiner issue a recommended decision.

nothing in the Conference reports indicating that failure of the Commission to follow these recommendations would, in the Conference's view, result in a denial of constitutional due process. Proof positive is the fact that Judge Prettyman who, in writing the opinion for the court below, gave short shrift to Petitioners' contentions in this regard, was also the Chairman of the Administrative Conference.[27]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[27] While, as Petitioners note (Pet. p. 32, fn. 25), Commissioner Loevinger, has expressed opposition to these Commission procedures, his opposition is based on policy, not on constitutional, or even statutory, grounds. See *American Telephone & Telegraph Co., supra,* at 880, 888.